Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

In Re: GWEN G. CARANCHINI.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Does Petitioner's Disbarment in State Court Based Solely upon the Sanctions Entered by the Federal Courts Violate the Double Jeopardy prohibition of the Fifth Amendment to the United States Constitution?

B. Was Petitioner Denied Due Process in the taking of her law license by the Missouri Supreme Court as Guaranteed by the Fourteenth Amendment to the United States Constitution when she was denied a hearing on the facts giving rise to the ethical violations upon which her license was revoked?

C. Is Disbarment Under the Circumstances of this Case an Excessive Civil Fine in Violation of the Eighth Amendment to the United States Constitution?

LIST OF PARTIES

The Petitioner is Gwen G. Caranchini. The other persons interested in this matter would be The Missouri Supreme Court and Chief Disciplinary Counsel for the State of Missouri, John E. Howe.

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OPINIONS BELOW

The opinion below is reported as *In Re Gwen G. Caranchini*, 956 S.W. 2d 910 (Mo. en banc 1997), As modified on Denial of Rehearing, December 23, 1997.

JURISDICTION AND STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

(i) The date of the entry of the judgment or decree sought to be reviewed was initially, November 26, 1997.

(ii) A Petition for Rehearing was timely filed. The Petition for Rehearing was Denied and a Modified Order was entered December 23, 1997. A Motion for Extension of Time was filed with the United States Supreme Court on March 11, 1998. It was granted on March 20, 1998 extending the time to file the Petition for Certiorari to May 22, 1997. (*See* Application No. A-701). This Petition is therefore timely filed.

(iii) The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment or decree in question by writ of certiorari is: 28 U.S.C. § 1257 on the grounds that:

(a) Petitioner claims that her disbarment in the Missouri Supreme Court violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and therefore involves a substantial federal question which is in conflict with federal law.

(b) A disbarment of an attorney in Missouri may only be rendered by the Supreme Court of the State of Missouri and therefore, the only right of appeal would be to this Court.

(c) Petitioner claims the Missouri Supreme Court has violated Article I, Section 19 of the Missouri Constitution.

(d) Petitioner claims the disbarment violates Missouri State Law requiring that Petitioner be given a hearing on the facts of her disbarment as set forth *In Re Littleton*, 719 S.W. 2d 772 (Mo. 1986) and *In re Weiner*, 530 S.W. 2d 222 (Mo. en banc 1975).

(For relevant statutory and constitutional provisions, *see* App. C, 23a).

STATEMENT OF THE FACTS PERTINENT TO THE CASE

This Disbarment matter commenced after the imposition of sanctions[1] in *White v. General Motors*, 126 F.R.D. 562 (D. Kan. 1989),[2] *Perkins v. General Motors*, 129 F.R.D. 655 (W.D. Mo. 1990)[3] and *Pope v. Federal Express*, 138 F.R.D. 675 (W.D. Mo. 1990)[4] when The Honorable Dean Whipple[5] sent a letter to the Missouri Bar[6] referring Petitioner for investigation

1. Sanctions were entered under Rule 11 in all four cases but were also sought under other statutes.

2. There was never any hearing in *White* on the sanctions sought. Rather, the District and Appellate Courts denied the right to hearing and discovery on the sanctions matter and permitted only briefing until after the sanctions were affirmed. Then a brief hearing was permitted on the amount of sanctions.

3. A hearing was had on the facts giving rise to the sanctions before the Honorable D. Brook Bartlett which was bifurcated: the first part on liability, the second on the penalty to be imposed. "Liability" was found in February 1990. But by the time the hearing arose on the penalty to be imposed almost one year later (June 1991) on the eve of the retrial of the case which had been remanded to the District Court for trial by jury, the parties decided to settle. General Motors moved to withdraw the sanctions as part of the settlement, but Judge Bartlett refused. Petitioner filed a Writ to the Eighth Circuit on the refusal to withdraw the sanctions on the grounds there was no case and controversy and sought a stay of the briefing on the underlying sanctions until the Writ was determined. During oral argument, Eighth Circuit Chief Judge Arnold agreed and asked that Petitioner and her attorney not argue the issue. Three weeks later, Chief Judge Arnold recused on the matter. Shortly thereafter, the Writ was denied, and the sanctions were affirmed without permitting Petitioner any briefing on the appeal of the sanctions entry. Rehearing was sought on the denial to allow briefing, but was denied.

4. The sanctions were sought by the defendants against the plaintiff, not Petitioner. After a three day hearing, and without any notice to Petitioner, the trial court entered sanctions against the plaintiff and Petitioner. When it was brought to the trial court's attention that sanctions could not be entered against Petitioner without prior notice, the trial court set aside the sanctions and set the matter for hearing on his motion for sanctions against Petitioner. It was clearly a foregone conclusion, however, such sanctions would be entered.

5. The Honorable Dean Whipple, United States District Judge for the Western District of Missouri, was the sanctioning judge in Pope.

6. Neither Judge Whipple nor any other United States District Judge or Magistrate instituted proceedings under the Local Rules of the United States District Court for the Western District of Missouri which permits judges to seek after due process to have an attorney removed from the roles of the admitted attorneys.

based upon the sanctions then entered against Petitioner in these three cases. Subsequent to these three sanctions, a fourth sanction, in *Platt v. Jack Cooper Transport*, 959 F.2d 91 (8th Cir. 1992)[7] was entered.

In approximately 1993[8] the matter was referred to the Jackson County Circuit Court Disciplinary Committee[9] for a "probable cause" hearing upon a "Proposed Information" filed by the Missouri Bar alleging violations based *solely* upon the sanctions entered. The drafted Proposed Information took what it believed to be "facts" concluded by the sanctioning courts and alleged ultimate violations of Missouri disciplinary rules. This Proposed Information *did not* set out the specific facts allegedly concluded in the sanction rulings which supported the alleged ethical violations. For that matter the Proposed Information *did not* set out *any* specific facts upon which the *conclusory violations of ethical rules were allegedly based or what specific factual acts giving rise to ethical violations the Bar believed Petitioner had engaged.* From the manner in which the Proposed Information was drafted, it was clear the Bar was proceeding with the disbarment request based solely upon the sanction decisions without delineating to Petitioner what specifically she had done wrong which gave rise to a specific ethical violation. No facts from any other source outside the sanction rulings were raised by the Bar.[10]

It was also clear that the Bar did not intend to "prove up" any facts that had come to light during the sanction matters but rather contended its burden of proof had already been met when the sanction rulings were entered. In short, the sanctions formed the basis for seeking further punishment against Petitioner without need for further

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7. This sanction was entered by the Eighth Circuit Court of Appeals without hearing after Petitioner appealed the denial of entry of sanctions against defendant by The Honorable D. Brook Bartlett.

8. The matter was stayed pending resolution of the appeals on *White, Perkins, Pope* on the underlying liability for sanctions.

9. The Disciplinary Rules have changed several times over the last several years in Missouri (September 11, 1990, September 10, 1991, October 16, 1991, November 19, 1991, December 17, 1991, June 3, 1992, April 26, 1993, September 7, 1993, October 26, 1993 October 3, 1994, June 20, 1995) in their procedural format but generally appear at Rule 5.

10. The Bar was required to provide Petitioner the basis for its allegations against her. This consisted of the four rulings then entered against her.

proof of causation or linkage of the sanction violations to ethical violations.

In September and November of 1993 the Circuit Bar Committee took some evidence in a hearing.[11] Petitioner took the position from the inception of the proceedings that the Bar should set out the specific actions she took which gave rise to the specific allegation of ethical wrongdoing and that she should then be able to litigate whether those facts did in fact occur, and then whether those *facts* give rise to an ethical violation separate and apart from any violation of Rule 11 or any of its counterparts. An example would be that the Bar claimed, based upon the sanctions, that Petitioner failed to make a reasonable investigation into certain matters. Petitioner claimed the Bar should set forth what they claimed Petitioner should have done, but did not in fact do and bear the burden of proof on those issues. The Bar claimed the sanctioning trial court(s) found Petitioner did not make a reasonable investigation, and therefore, it was not necessary to either state *or prove* what Petitioner did not do. However, Petitioner claimed her investigations into law and fact were reasonable under the circumstances and she wished to know what the Bar believed was improper and then have the opportunity to rebut those allegations. This she was not permitted to do.

In effect, the Bar and the Missouri Supreme Court's position was, whatever the sanctioning court says is "unreasonable", then it is "unreasonable" for purposes of Missouri ethical violations and there is no further burden of proof upon the Bar to demonstrate violation of the Missouri ethical rules. The only issue remaining is penalty. On this premise, the Bar in responding to Petitioner's Motion to Make More Definite and Certain and for discovery under the Missouri Rules of Civil Procedure seeking specific basis for each ethical violation charged, opposed setting forth any specific facts and chose to plead only in conclusory fashion. There was to be no litigation of facts, only litigation of penalty.

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11. This evidence did consist in part of the facts giving rise to the sanctions. However, this evidence was used only to determine the basis of "probable cause" to proceed. It was never put before the Master appointed by the Missouri Supreme Court to hear evidence as he determined that no such evidence could be considered because "offensive collateral estopped" effect would be given the "facts" concluded by the sanctioning courts in the bar proceedings. The only "evidence" considered by the Master was mitigating and aggravating facts.

At the Circuit Committee hearing, the Circuit Committee was skeptical of taking evidence other than the sanction rulings but did take some of the evidence. The Bar's evidence consisted of the sanction rulings and some testimony from the lawyers involved in those sanction matters but no other witnesses. Petitioner produced all of her clients involved in the sanction matters, and numerous lawyers in the community who acted as experts in the areas of law addressed in the sanctions.

Approximately eleven months after the Circuit Bar hearing the Committee made findings as to what matters could proceed to the "Information" stage before the Missouri Supreme Court and the Proposed Information became an "Information" filed in the Missouri Supreme Court in October of 1994. Many charges were eliminated (mostly based on whether Petitioner had a basis under *law* to proceed), and the remaining allegations, whether she had a sufficient basis under the facts and her motivation in taking actions, proceeded to the "Information" stage of the proceeding. The Missouri Supreme Court appointed a "Master" pursuant to Missouri Rules to take "evidence." Petitioner filed an "Answer" raising numerous defenses, including the constitutional objections raised here.[12]

The parties filed Cross Motions for Summary Judgment[13] and Petitioner filed a Motion to Compel Response to Discovery. The major thrust of these Motions was twofold: whether the disbarment proceedings were barred by the "double jeopardy" principles of the Fifth Amendment to the United States Constitution as applicable through the Fourteenth Amendment to the United States Constitution; and, whether "offensive collateral estoppel" could be applied to the sanctions entered thereby precluding any litigation of facts on the issue of ethical violations.[14] Petitioner

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12. The Answer to the Amended Information, which was the Information which proceeded before the Missouri Supreme Court, was filed September 25, 1995 and raised the issues recited herein among other affirmative defenses.

13. Petitioner's Response to the Bar's Motion for Summary Judgment raised the Constitutional Objections under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Missouri Constitution as well as the conflicts with-state law decisions as of the time of the proceedings.

14. Concomitant with this argument was Petitioner's argument that she had been denied discovery on the specifics of the charges against her in the Information in that there was no reference in the Information to what specific "facts" allegedly concluded in the sanction matters gave rise to specific ethical violations with which she was being charged. Given that the language of the Missouri ethical rules is not (Cont'd)

argued that the Disbarment proceedings violated the Fifth Amendment as applicable through the Fourteenth Amendment to the United States Constitution, and likewise violated due process standards applicable in disbarment matters through the Fourteenth Amendment to the United States Constitution as she had a property interest in her license to practice law.

In May of 1996 the Master denied Petitioner's arguments raising constitutional objections, granted the Bar summary judgment on the issue of the applicability of the offensive use of collateral estoppel and based upon that ruling denied most of Petitioner's discovery requests. Leave was also granted to file an Amended Information specifically raising the use of collateral estoppel and an Answer was filed.[15]

A hearing was had before the Master August 15 and 16, 1996. No evidence was permitted on the underlying facts[16] giving rise to the sanctions; nor was any other type of evidence permitted which attacked the entry of the sanctions collaterally.[17] The Master reserved to himself the issue of whether the facts *concluded* in the sanction orders supported the Amended Information's proposed ethical violations. Petitioner was limited to "mitigating" evidence[18] and the Bar to "aggravating"[19] evidence.

(Cont'd)
identical to the charges raised in the sanction matters, Petitioner believed she should have specific notice as to how the "facts" concluded in one matter (and not by hearing in all four circumstances) could be applied in a separate proceeding to disbar.

15. Again, the constitutional challenges were raised in the Answer to the Amended Information.

16. Offers of proof were made to the Master by submitting the transcripts from the hearing before the Circuit Court Committee which had the evidence before it on the underlying facts giving rise to the sanctions and the other matters raised to attack the entry of sanctions. However, both the Master and the Missouri Supreme Court rejected these offers of proof.

17. The Master did take some testimony from attorneys who testified that from an ethical standpoint they would have taken the same actions as Petitioner or that her actions were not in their opinion violations of the ethical precepts. However, the Missouri Supreme Court specifically rejected this testimony when it was reviewed by them as a "collateral attack" on the underlying sanctions which they would not permit.

18. This as defined in the American Bar Association rules.

19. The Bar contended throughout these proceedings that Petitioner's attempt
(Cont'd)

The only evidence which the Bar offered were the sanction rulings[20]. No witnesses were called by the Bar although it represented to the Master it would call the federal district Judges involved in entering the sanctions, including Judges Bartlett and Whipple. Petitioner put on numerous lawyers in the community, a Deputy U.S. Attorney, a Judge, clients, staff and herself on issues of mitigation.

The Master solicited Proposed Findings of Fact and Conclusions of Law after indicating to the attorneys his decision that although he would make findings of ethical violations he was not inclined to issue any discipline at all given the extensive mitigating circumstances. The Bar then wrote the Master and stated that Missouri law mandated some discipline be imposed if he found any ethical violations. The Master then indicated he would impose the least severe penalty — a reprimand. The Proposed Findings and Fact were submitted, the Master edited and finalized them. His ruling was entered April 23, 1997 finding no aggravating circumstances, numerous mitigating factors and recommending a reprimand.

Briefing in the Missouri Supreme Court followed raising the constitutional issues before this Court[21] as either the basis for a hearing on the facts, or alternatively if the Court insisted on relying on the

(Cont'd)
to relitigate the facts was in itself an "aggravating circumstance" because it showed a "lack of remorse" which is an aggravating circumstance under ABA standards. Petitioner, her attorneys and the Master contended that she had a right to maintain her innocence where the facts were contested. The Missouri Supreme Court, however, agreed with the Bar and found "lack of remorse" inferentially at least because of Petitioner's continuing to contest the sanctions.

20. These cases are part of Petitioner's Show Cause Response before this Court.

21. The issues of Double Jeopardy and Due Process violations were raised with the Missouri Supreme Court in the briefing filed in the summer of 1997 after the issuance of the Master's decision in April. The issue of "excessive fine" under the Eighth Amendment to the United States Constitution was not raised in that brief because at the time, Petitioner did not believe that disbarment would be considered given the recommendation of the Master only to reprimand. Although the Master's recommendations are that, a recommendation, Petitioner and her counsel had in their research never found a case where the penalty was increased so incrementally after such a recommendation. The disbarment came as a total surprise given the Master's ruling. Petitioner does believe the issue of "excessive fine" has been raised at the first opportunity, this appeal, as until that point in time there was no excessive fine levied against Petitioner.

concluded sanctions, on the grounds of "double jeopardy". Oral argument before the Missouri Supreme Court occurred in September and on November 26, 1997 the Disbarment Order was entered. A timely Petition for Rehearing was filed by Petitioner. It was signed by countless attorneys in the metropolitan area. Rehearing was summarily denied December 23, 1997; the mandate was issued on December 24, 1996.

Petitioner receipted for the Mandate January 2, 1998 and immediately forwarded the Mandate to the United States District Court for the Western District of Missouri, the Eighth and Tenth Circuit Courts of Appeal and this Court. The three Judges in the United States District Court before whom she was then practicing continued to permit her to practice and even schedule trials. The United States District Court for the Western District of Missouri's Show Cause Order, signed by Chief Judge D. Brook Bartlett,[22] was received by Petitioner January 23 and response was due February 23. A request for extension because of a scheduled trial was denied by Chief Judge Bartlett. A response to the Show Cause Order was made February 23.[23] On March 12, 1998 an order disbarring Petitioner was entered based solely on the Missouri Supreme Court's ruling. It is not known who participated in this decision as the Order indicated that not all Judges were present at the en banc meeting. That disbarment was appealed to the United States Court of Appeals for the Eighth Circuit and Petitioner's brief in that matter was filed May 11, 1998.[24]

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22. This was one of the sanctioning judges who was involved in two of the four sanctions entered.

23. Petitioner claimed in response to that show cause order that the Missouri disbarment was based on violations of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Petitioner also claimed, however, that assuming arguendo there were no state court constitutional violations, to disbar Petitioner in federal court where she had once already been sanctioned for these events was clearly in violation of the Fifth and Eighth Amendments to the United States Constitution. Likewise, the participation of Judges Bartlett and Whipple who had participated in the sanctions was clearly inappropriate under the District Court rules and they should recuse themselves for this reason. Petitioner sought recusal of these judges, but it was denied.

24. No other briefs are scheduled to be filed in this matter. Oral argument has been requested but not set at this time or indication given whether oral argument will be permitted.

A Show Cause Order was received from the United States Supreme Court in February and response to it was made in early April. No response on that Show Cause Order has been received.

A Show Cause Order was entered by the United States Court of Appeals for the Eighth Circuit on April 15 requesting response May 4, 1998. However, Petitioner was scheduled for surgery on April 20 and a short extension was obtained to May 11, 1998. The Response to the Show Cause Order was made May 11, 1998. No order has been entered on that Show Cause Order to date. The Tenth Circuit has not issued a Show Cause Order.

Petitioner had hoped that the rulings would have been had on the appeal of her disbarment in the United States District Court and, if entered the Eighth Circuit Court of Appeals at the time of the filing of this Petition for Certiorari. However, those rulings have not been had as of this time and no further extensions of this Petition for Certiorari are permitted under the rules. However, depending on the outcome of the appeal of the disbarment in the District Court, now pending in the United States Court of Appeals for the Eighth Circuit, and the result of the Show Cause Order entered by the Eighth Circuit Court of Appeals, Petitioner may seek to either supplement this Petition for Certiorari or file a separate Petition for Certiorari on the grounds that whether or not she should have been disbarred in the *state court* her disbarment in the federal courts is a clear violation of the "double jeopardy", excessive penalty and "due process" standards afforded attorneys who have been admitted to practice in the federal courts and that she should therefore be permitted to practice in the federal courts even without a state court license.

Petitioner also believes the following facts are pertinent to her claim that the disbarment in state court is in violation of her right to be free of excessive civil fines under the Eighth Amendment to the United States Constitution as applicable to her through the Fourteenth Amendment to the United States Constitution.

The sanctions arose from Petitioner's alleged actions during the time period 1988 through 1992. Petitioner has not been sanctioned since the sanctions were entered in *Platt v. Jack Cooper Transport*, 959 F.2d 91 (8th Cir. 1992). No state court has ever sanctioned Petitioner. At the time of the hearing before the Missouri Supreme Court no Court had denied Petitioner the right to practice. During the Master's hearing Petitioner's clients related how she would go beyond

what most lawyers would do to make themselves accessible and of the considerable pains she took to make the cases easier on her clients. Her clients spoke highly of her professionalism. There was also testimony at the Master's hearing from numerous attorneys who have either had cases with Petitioner as opposing counsel, as cocounsel or observed her work and who testified about her expertise; how she contributed to young attorneys' knowledge of the law without any request for fees, how if she lost her license it would adversely affect other lawyers in the area who regularly consulted with her on numerous matters for whom there is no local "expert"; of her high ethical standards, her dedication to her clients and her prodigious knowledge of the law. Testimony was taken from leading lawyers in the metropolitan area who supported Petitioner's position she had not violated any provisions of the Missouri Code of Professional Responsibility as applicable, and that they would have done the same thing if they had been in these cases. These lawyers also testified from daily exposure that the language from Rule 11 did not "track" the language from the Missouri Code of Professional Responsibility. A lawyer who sits on the Johnson County, Kansas Ethics Committee also testified Petitioner did not violate any ethical precepts with regard to the Kansas case. Testimony from Petitioner about the effect the sanctions and the disbarment proceedings have had on her personally, professionally and financially since 1989, which testimony was never controverted; that, despite the finding of the courts at the time the monetary sanctions were imposed that she would be able to pay those sanctions, she had been unable to pay the sanctions in full until 1998. She offered her tax returns to show the combined sanction amounts exceeded the net compensation Petitioner received from her practice of law since 1991 and her gross receipts in at least two years since that date. Finally, she testified that with hindsight she would have done some things differently.

REASONS FOR GRANTING THE WRIT

I. DOES PETITIONER'S DISBARMENT IN STATE COURT BASED SOLELY UPON THE SANCTIONS ENTERED BY THE FEDERAL COURTS VIOLATE THE DOUBLE JEOPARDY PROHIBITION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

The Fifth Amendment to the United States Constitution states in part[25]:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

Article I, Section 19, of Missouri Constitution (1945)[26] prohibits a person from being put again

> . . . in jeopardy of life or liberty for the same offense, after being once acquitted by a jury.

Although the Missouri Constitution is somewhat more restrictive in language than the United States Constitution, the Fifth Amendment is applicable to Missouri through the Fourteenth Amendment mandate. *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969) and *State v. Bowles*, 754 S.W. 2d 902, 907 (Mo. App. 1988) citing *State v. Richardson*, 460 S.W. 2d 536, 538 (Mo. Banc. 1970). These guarantees consist of several separate and distinct constitutional guarantees, including:

First: the right to be free from a second prosecution for the same offense after acquittal; and

Second: the right to be free from a second prosecution for the same offense after conviction; and

Third: *the right to be free from multiple punishments for the same offense; and*

Fourth: the right to be free from multiple prosecutions for the same offense.

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25. *See* Appendix at p. 32a.

26. *See* Appendix at p. 23a for the text of this provision. The Missouri Court of Appeals has found that there is no real difference between the Missouri Constitution and the Federal Constitution with regard to the "double jeopardy" clause. *State v. Reed*, 770 S.W.2d 517 (Mo. App. 1989).

Bowles at 907 citing *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

After *Pearce* the United States Supreme Court took for a number of years an increasingly expansive view of the "double jeopardy" clause. In 1989 the Supreme Court held that the Fifth Amendment applied to imprisonment, *monetary penalties* and *other forms of punishment as well. United States v. Halper*, 490 U.S. 434, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). *Halper* held a *civil* penalty may constitute "punishment" for purposes of "double jeopardy" analysis. This view has deep roots in our history and jurisprudence:

> As early as 1641, the colony of Massachusetts in its "Body of Liberties" stated: "No man shall be twice sentenced by civil justice for one and the same crime, offense or trespass." American Historical Document 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910). In drafting his initial version of what came to be our Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense." 1 Annals of Cong., 434 (1789-1791 C.J. Gales ed. 1934). In our case law too, the Court, over a century ago observed: "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." Ex Parte Lange, 18 Wall. 163, 21 L.Ed. 872 (1874).

The Missouri Supreme Court attempted to distinguish *Halper* by *stating*[27] that the disbarment is not "punishment" for purposes of the "double jeopardy" clause and therefore "double jeopardy" is not an issue. However, the Missouri Supreme Court's *claiming* disbarment is *not* "punishment" for purposes of the Fifth Amendment "double jeopardy" bar is in direct contravention to *Halper* which disregarded "labels" attached to forms of punishment. After *Halper* it is not the *label* of "criminal" or "civil" or "punishment" as *characterized*, but whether what has in fact been assessed *is* "punishment". Civil penalties such as disbarment can clearly form the basis for a "double jeopardy" argument. As the *Halper* Court stated (*Id.* 490 U.S. at 447-48):

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27. *See* Missouri Supreme Court Opinion at Appendix, pp. 7-8a.

> The notion of punishment, as we commonly understand it, *cuts across the division between the civil and criminal law*, and for purposes of assessing whether a given sanction constitutes a multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads.
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> * * *
>
> [A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive *or deterrent purposes, is punishment*, as we have come to understand the term. Id. at 448. (emphasis added).

See also Austin v. United States, 509 U.S. 125, 13 S. Ct. 2801 (1993) where the Supreme Court stated that when a civil sanction cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or *deterrent* purposes, it is "punishment" within the meaning of the "Double Jeopardy" clause. The Missouri Supreme Court acknowledges there are both "punitive" and "deterrent" elements in the sanctions.[28] Therefore, despite any "labeling" to the contrary by the Missouri Supreme Court, disbarment is "punishment" for purposes of "double jeopardy".

In *Department of Revenue of Montana v. Kurth Ranch*, 521 U.S. 112 S. Ct. 1937, 128 L. Ed. 2d 767 (1994) the Supreme Court addressed the further question of whether or not a civil penalty constitutes "punishment" for purposes of "double jeopardy" . The court held that civil sanctions that punish an individual for activities for which criminal prosecution has been brought constitute multiple punishments, and therefore violate the "Double Jeopardy" clause of the Fifth Amendment to the United States Constitution.

Prior to the decision of the Missouri Supreme Court, the most recent United States Supreme Court decision addressing "double jeopardy" was the case of *Kansas v. Hendricks*, 521 U.S. __, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). Although this Court did not find "double jeopardy" present, the lengthy recitation to the law of "double jeopardy" clearly supports that the proceedings instituted by the Bar do constitute "double jeopardy" and that therefore the Missouri

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28. *See* Missouri Supreme Court Opinion at Appendix, p. 8a

Supreme Court should have dismissed these proceedings as being barred by the Fifth Amendment. In *Hendricks* the key factor was whether the state is *punishing* twice for the same offense.

Since the Missouri Supreme Court's decision this Court has again addressed the issue of double jeopardy in the case of *Hudson v. United States*, __ U.S. __, 118 S. Ct. 488, 489, 139 L. Ed. 2d 450 (1997). Language from the concurring opinion of Justice Stevens seeking to explain the opinion supports Petitioner's position that the instant case presents a case for the application of "double jeopardy" principles:

> Despite my disagreement with the Court's decision to use this case as a rather lame excuse for writing a gratuitous essay about punishment, I do agree with its reaffirmation of the central holding of Halper and Department of Revenue of Mont. v. Kurth Ranch, 511 U.S.767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994). Both of those cases held that sanctions imposed in civil proceedings constituted "punishment" barred by the Double Jeopardy Clause. [FN4]
>
> > FN4 Other recent double jeopardy decisions have also recognized that double jeopardy protection is not limited to multiple prosecutions. See United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 2139-2140, 135 L.Ed.2d 549 (18856), Kansas v. Hendricks, 521 U.S. at __, 117 S.Ct. at 2085-2086. Otherwise, it would have been totally unnecessary to determine whether the civil forfeitures in Ursery and the involuntary civil commitment in Hendricks imposed "punishment" for double jeopardy purposes, for neither sanction was implemented via criminal proceedings.
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> *Those holdings reconfirmed the settled proposition that the Government cannot use the "civil" label to escape entirely the Double Jeopardy Clause's command, as we have recognized for at least six decades.* See United States v. La Franca, 282 U.S. 568, 564-575, 51 S.Ct. 278, 281, 75 L.Ed. 551 (1931); Helvering v. Mitchell, 303 U.S. 391, 398-399, 58 S.Ct. 630, 632-633, 82 L.Ed. 917 (1938). *That proposition is extremely important because the States*

> *civil administrative sanctions at their disposal that are capable of being used to punish persons repeatedly for the same offense, violating the bedrock double jeopardy principle of finality. The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity* . . . Green v. United States, 355 U.S. 184, 1897, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). However the Court chooses to recalibrate the meaning of punishment for double jeopardy purposes, our doctrine still limits multiple sanctions of the rare sort contemplated by Halper.

There are two questions that need to be answered then with regard to the Bar proceedings against Petitioner:

1. Did the Missouri Supreme Court "proceeding" constitute a "separate proceeding" for purposes of the "Double Jeopardy" clause?

The answer is an unequivocal "yes". Clearly an administrative hearing which seeks the suspension or revocation of Petitioner's license to practice law is a "second proceeding" separate and apart from the Rule 11 proceedings in each of the four separate court cases.[29]

2. Are the sanctions imposed under Rule 11 and the "sanctions" sought by the Bar each "punishment" for purposes of raising the bar of "double jeopardy"?

The answer is an unequivocal "yes". The "comments" to the 1983 Amendments to Rule 11 state:

> The word "sanctions" in the caption, for example, stresses *a deterrent* orientation in dealing with improper pleadings, motions or other papers. . . .

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29. The successive sanctions built upon each other; that is, the second sanction mentioned the first sanction as aggravating factor the third sanction mentioned the first and second sanctions as an aggravating factor, and the last sanction mentioned the previous three sanctions.

The United States Supreme Court in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) found that the *central purpose* of Rule 11 is to *deter* baseless filings in district court. It cannot be disputed that the imposition of $77,000 against a sole practitioner in the span of three years is significant "punishment" in and of itself especially when Petitioner was unable to pay the monies and the amounts with interest rose to almost $97,000.

The United States Supreme Court has stated that disbarment is a form of "punishment". *In the Matter of Ruffalo*, 391, U.S. 961, 88 S. Ct. 1833, 20 L. Ed. 2d 874 (1968):

> *Disbarment*, designed to protect the public, *is a punishment or penalty imposed on the lawyer.* Ex parte Garland, 4 Wall. 333, 380, 18 L.Ed. 366; Spevack v. Klein, 385 U.S. 511, 515, 87 S.Ct. 625, 628, 17 L.Ed.2d 574. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682.

Since Rule 11 sanctions and disbarment are *both* punitive in nature, the imposition of disbarment here constitutes a violation of the "Double Jeopardy" Clause of the United States Constitution and the Missouri Constitution. Although states have broad power to regulate the practice of Law, *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967), the power of states to control the practice of law cannot be exercised so as to abrogate federally protected rights. *Johnson v. Avery*, 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969).

The Missouri Supreme Court claims the characterizing of disbarment as "punishment" in *Ruffalo* was not meant to be the same characterization for purposes of "double jeopardy".[30] The Missouri Supreme Court's analysis of "double jeopardy" is clearly at odds with the Supreme Court's recent rulings in Double Jeopardy cases and Justice Stevens' statement of the principles. Attempting to characterize the proceedings as anything but punishment, the Missouri Supreme Court ignored the case law on double jeopardy. One has to seriously question the Supreme Court's finding that the disbarment

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30. *See* Missouri Supreme Court Opinion at Appendix, pp. 8-9a.

seriously question the Supreme Court's finding that the disbarment was not "punishment" and was merely an attempt to "protect the public" after reading the transcript and the evidence before the Master who *reluctantly concluded* that Petitioner should be subjected to a reprimand and when it was clear that the majority of the actions giving rise to the disbarment occurred in 1988-1990 with one incident in 1991 and no incidents of any kind after that until disbarment in December 1997.

II. WAS PETITIONER DENIED DUE PROCESS IN THE TAKING OF HER LAW LICENSE BY THE MISSOURI SUPREME COURT AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN SHE WAS DENIED A HEARING ON THE FACTS GIVING RISE TO THE ETHICAL VIOLATIONS UPON WHICH HER LICENSE WAS REVOKED?

There is no question that a lawyer's license to practice law is a "property interest" that cannot be the subject of a "taking" by the state unless *full* due process is accorded the attorney. The right to "due process" in the taking of one's law license, is a right that cannot — and should not — be "shortchanged" by abbreviated proceedings. Thus, both the United States Constitution and the Missouri State Constitution protect an attorney from having his license taken unless full due process is accorded.

Applying offensive collateral estoppel to Rule 11 sanctions does not comport with the due process requirements for the taking of an attorney's license as set forth in *Theard v. United States of America*, 354 U.S. 278, 77 S. Ct. 1274, 1 L. Ed. 2d 1342 (1957); *Konigsberg v. The State Bar of California*, 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810 (1957); *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957); *In Re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968) and *Selling v. George Radford*, 243 U.S. 46, 37 S. Ct. 377, 61 L. Ed. 585 (1917). Each of these cases stand for the principles that

- the disbarring court must *determine for themselves the facts of the attorney's conduct and not delegate that to another court;*
- that disbarment is a matter of last resort;
- that full and complete due process must be given in disbarment situations;

— that the attorney have notice *before* the disbarment proceedings begin of the grounds upon which disbarment is being sought so that the allegations are clear and not vague. This for the reason, as the concurring opinion in *In Re Ruffalo* states (88 S. Ct. at 1229), that attorneys should not be disbarred on the basis of a determination *after the fact* that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct.

Prior to the instant case, the Missouri Supreme Court's opinions had apparently not only espoused these principles but adhered to these principles. The instant case, however, stood these principles on their head and is directly contrary to Missouri Statutes, Missouri Rules and the Missouri Supreme Court's own prior opinions.[31]

Heretofore, the Missouri Supreme Court — except in two *limited statutory* circumstances — *MANDATED* that an attorney be given a hearing on the merits of the Information. The Missouri Supreme Court — not a federal court — under Missouri law is charged with determining *all fact* issues necessary to reach a decision to reprimand, suspend or discharge. *In Re Littleton*, 719 S.W. 2d 772 (Mo. 1986). Here, the Missouri Supreme Court overturned precedent[32] by accepting *fact conclusions* reached by the federal judiciary.

Petitioner believes the Missouri Supreme Court had already addressed the instant question of *what* it must decide in the case of *In re Weiner*, 530 S.W. 2d 222, 224-25 (Mo. en banc 1975) wherein the Missouri Supreme Court stated:

> As said in *Florida Bar v. Wilkes*, 179 So. 2d 193, 197 (Fla. 1965):

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31. *See* Missouri Supreme Court Opinion at Appendix, pp. 4-7a discussing the offensive use of collateral estoppel.

32. There is no precedent in any jurisdiction, let alone Missouri, that a State Bar may offensively use collateral estoppel with Rule 11 findings to "take" an attorney's law license. The cases cited by the Missouri Supreme Court do not stand for the principle that collateral estoppel is appropriate in any but *criminal situations* and that is because the Missouri legislature has mandated that collateral estoppel effect. *In Re McBride*, 938 S.W. 2d 905, 907-08 (Mo. en banc 1997); *In Re Lurkens*, 374 S.W. 2d 67-68 (Mo. en banc 1964); *In Re Storment*, 873 S.W. 2d 226, 230 (Mo. en banc 1994); *In re Frick*, 694 S.W. 2d 473, 477-78 (Mo. en banc 1985). The Supreme Court ignored the precedent cited by Petitioner entirely on this issue.

> . . . In order properly to resolve this issue, this court and its agencies must, *in every disciplinary proceeding, whether based upon acts of misconduct already adjudicated in another state or upon acts committed in this state, fully inform themselves concerning the nature of the misconduct and all the attendant circumstances. In doing this all available sources which can be properly utilized should be considered, including all evidence properly offered in the Florida proceeding and the record of proceeding in the sister state. . . .*
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> We [*the Missouri Supreme Court] therefore conclude that before we arrive at a final decision this cause must be remanded to a master to be appointed by this court for an evidentiary hearing and findings of fact and recommendation on the issue of whether respondent had the permission of his client to use the $480.00 to apply on his fee.*

See also In re Harris, 890 S.W. 2d 299 (1994).

However, clearly under its decision in this case the phrase "fully inform themselves concerning all the attendant circumstances" has taken on a new *circumscribed* meaning —fully inform themselves of what a federal sanctioning court determined. What constitutes a "hearing" under M.S.C.R. 5.21 after this decision has significantly altered the prior guarantees of a *de novo* hearing[33] unless the lawyer chooses to default. Petitioner did not choose to default.

Although the Missouri Supreme Court claims "collateral estoppel" had been used offensively in other circumstances, the Missouri Supreme Court neglects to mention that the limited circumstances are *REQUIRED* by Rule of the Missouri Supreme Court and by *STATUTE* of the Missouri Legislature where the attorney has engaged

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33. Additionally "comments" on the procedures of Rule 5 have repeatedly appeared in Missouri Bar publications all of which indicate a hearing is contemplated. (*See* Mo. Bar Bulletin, July 1995, p. 9; Journal of the Missouri Bar, July/August 1995, p. 242: "As stated above, the Supreme Court was the ultimate determiner of fact".)

in *criminal conduct*[34] and not by application of the doctrine through the "common law". Where "collateral estoppel" is allowed in disciplinary proceedings, the attorney has in fact been afforded a "full and fair opportunity to be heard" *somewhere else such as a criminal trial before a jury*[35] *or a disciplinary hearing*[36] where the facts are litigated not taken from judicial conclusions in sanction proceedings. *Petitioner has never been accused of engaging in any criminal activity; and, Petitioner has not pled nolo contendre to any criminal activity.* The cases cited by the Missouri Supreme Court are, if not all, criminal cases — not Rule 11 cases as Petitioner has been involved with in this disciplinary action and therefore inapposite to the case at bar.

As Petitioner had not been found guilty of criminal conduct or pled *nolo contendre* to any criminal action, the Missouri Supreme Court was left to rely on drawing a parallel between the sanctions entered in federal court and the imposition of discipline in another state's disciplinary proceeding citing *In Re Storment*, 873 S.W. 2d 227 (Mo. banc 1994). *Storment* had in fact been suspended from practice by the Illinois State Bar for a period of two years after a hearing on the facts giving rise to a disciplinary inquiry. The Missouri Supreme Court pursuant to Rule 5.19 imposed a sanction upon him after making an independent determination of whether Missouri ethical precepts had been violated. The difference, however, between *Storment* and the instant case, is that Storment did have a hearing on the facts in a *disciplinary* context. Here, no State or Federal Bar has found Petitioner guilty of professional misconduct under ethical precepts and therefore Rule 5.19 and *Storment* are inapposite to the case at bar despite the Supreme Court's ruling to the contrary.

Nowhere in Missouri is there any statute or rule which permits an application of "collateral estoppel" to a civil sanction *under a*

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34. *See In the Matter of Earl H. C. Lurkins*, 374 S.W. 2d 67 (Mo. en banc 1964) and *In Re Douglas C. MacLeod*, 479 S.W. 2d 443 (Mo. en banc 1972).

35. Under Rule 5.20 the lawyer has either pled guilty, *nolo contendre*, or been found guilty of a criminal offense by a court and/or jury of a criminal matter, once again having had his day in court.

36. Under Rule 5.19 an attorney has already appeared before the disciplinary board of another's state's bar and had his day in court on the ethical issues raised against him.

different rule of law imposed upon a lawyer in another jurisdiction equivocating that sanction to an ethical violation. Neither the Missouri legislature nor the Missouri Supreme Court has promulgated any statute or rule which mandates that an attorney who has violated Rule 11 be the subject of automatic discipline before the Missouri Supreme Court without a hearing of the evidence on the Information as is provided for under 484.250 R.S. Mo., or Rules 5.19 and 5.20.[37] The Missouri Supreme Court pointed to no such statute nor rule nor any case which so finds. Nor did the Missouri Supreme Court point to any case in any other jurisdiction which has found that a Rule 11 sanctions should be given collateral estoppel effect before a state bar disciplinary committee. This theory was a matter of first impression not only in Missouri but in the United States.

Further evaluation of the application of the doctrine of "collateral estoppel" to disciplinary proceedings demonstrates additional due process arguments against its use. The Missouri Supreme Court determined that not only was the principle of "offensive collateral estoppel" applicable in the instant case, but that all the elements had been met. However, if the Missouri Supreme Court had correctly applied the principles of collateral estoppel, they would have recognized, due process had not been afforded Petitioner and therefore use of Rule 11 sanctions as the basis for disbarment is inappropriate under principles of collateral estoppel.[38] In *Oates v. Safeco Insurance Company of America*, 583 S.W. 2d 713, 719 (Mo. en banc 1979) the Missouri Supreme Court set forth the four elements of offensive collateral estoppel:

1) Identity of *issue* between the previous and present actions;

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37. *See* Appendix for text of these rules at pp. 23, 24, 25, 34, 35a. Please note that 484.240 R.S. Mo. provides the specific circumstances where there can be no trial. The instant case is not one of those circumstances.

38. *See Paul A. Christiansen v. Missouri State Board of Accountancy*, 764 S.W. 2d 943 (Mo. App. 1988), Motion for Rehearing and/or Transfer to Supreme Court Denied (Jan. 31, 1989) and *Paul A. Christiansen v. Missouri State Board of Accountancy*, 764 S.W. 2d 952 (Mo. App. 1988), Motion for Rehearing and/or Transfer to Supreme Court Denied (Jan. 31, 1989) discussing collateral estoppel principles involving revocation of licenses.) As these two cases demonstrate, it is insufficient to allege that facts are concluded; *what must be shown is the facts that are concluded bear directly on the issues of ethical violations. This the Missouri Supreme Court failed to do.*

2) Finality of the previous action;

3) The party against whom collateral estoppel is asserted must be a party, or in privity with a party in the prior lawsuit; and,

4) The party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior lawsuit.

Petitioner concedes elements "2" and "3" are present, but denies elements "1" and "4" are present. More importantly, Petitioner contends that the absence of elements "1" and "4" amount to a denial of due process in the taking of her license.

An attorney in Missouri has always been on notice that if he engages in criminal conduct or matters of moral turpitude and is found guilty of same or pleads guilty to same his license will automatically be suspended or revoked. Likewise, an attorney in Missouri has always been on notice that if his license is revoked or suspended in another state, Missouri will consider likewise revoking or suspending it. However, an attorney in Missouri, prior to this case, has never been on notice that if he violates a federal rule of law for allegedly engaging in frivolous conduct in filings made as part of his representation of a client, that he is automatically subject based upon the findings of that court to discipline including disbarment.

An attorney under due process considerations *should* have the right to know *before he is subjected to disciplinary proceedings what specific types of conduct may automatically give rise to disciplinary proceedings.* Vague references should be insufficient to meet the requirements of the application of the doctrine of offensive collateral estoppel in disciplinary proceedings. Yet when the Missouri Supreme Court equivocated language from the sanction rulings with language from the Rules of Professional Conduct it imposed *without prior notice to Petitioner* that unspecified conduct can give rise to automatic discipline.

This unique view of adequate "due process" in the taking of a property interest, such as a license to practice law, has heretofore never been recognized by the Missouri Bar or any other state bar. Apparently, it has not been applicable in other state licensing venues either. Therefore, the first prong of collateral estoppel cannot be met because there is no prior *notification* of "identity of issues". There is no identity of issues because Rule 11 and the Code of Responsibility are two separate rules of law and the Missouri Supreme Court has not

given notice to attorneys that they are to be considered identical for purposes of imposition of discipline.

With regard to the fourth prong of collateral estoppel, the Missouri Supreme Court found Petitioner had a "full and fair opportunity" consistent with the principles of "collateral estoppel" to litigate the *sanctions* in the federal forum and therefore, there is no need to relitigate those "issues".[39] There are two issues presented by this over simplistic statement of the applicability of collateral estoppel principles to the case at bar: first, whether litigation of Rule 11 sanctions is a *concurrent* litigation of the Rules of Professional Conduct and, second, whether the "due process" accorded under Rule 11 is the same "due process" as should be accorded a "respondent" in a disciplinary hearing. No Court has addressed these two issues in the context of disciplinary proceedings based upon Rule 11 sanctions.

Petitioner contends she did not have sufficient due process in the four Rule 11 situations to meet the due process requirements for revocation of her license.

1) In *White* Petitioner never had any hearing whatsoever on the underlying sanctions, only on the issues of amount of monies due after remand; the matter was only briefed even though many issues were matters of credibility.

2) In *Perkins* the Court of Appeals never provided Petitioner an opportunity to even brief the issues of sanctions on appeal even though *Cooter & Gell, supra* clearly provides for a right of appeal.

3) In *Pope*, the issue was solely one of credibility of Petitioner and *Pope*; the Eighth Circuit affirmed on an abuse of discretion standard.

4) In *Platt* there was no hearing whatsoever; merely a finding of sanctions based upon a finding of Petitioner's "motives" as ascribed to by defense counsel.

This *should not be* the "due process" contemplated by the aforementioned United States Supreme Court cases or Missouri Supreme Court prior to this case. It does not give the attorney *every* opportunity to explain the circumstances. Each of the courts addressing disbarment clearly contemplate that the state bar set forth the specific facts denominating the actions of counsel which the State Supreme Court believes subject counsel to potential discipline. The

39. *See* Missouri Supreme Court Opinion at Appendix, pp. 5-7a.

respondent attorney then should have an opportunity to respond to specific factual allegations. But the Bar should always bear the burden of proving the facts and the ethical violations. After a hearing, the State Supreme Court, District Court, Circuit Courts of Appeal and the United States Supreme Court should independently determine based upon the facts adjudicated whether there is an ethical violation. No court has ever indicated that it takes fact conclusions *except in criminal matters* and accepts them as true for purposes of finding disciplinary violations. To do so takes the conclusions of a *separate* rule of law and makes that violation equivalent to a discipline breach. As the Illinois Supreme Court stated in *In re Owens*, 532 N.E. 2d 248, 252 (Ill. 1988):

> We will not, however, go beyond permitting the conclusive use of a criminal conviction and begin giving offensive collateral estoppel effect in a[an attorney] disciplinary proceeding to factual findings in a civil fraud action. The risk of unfairly imposed discipline is too great, and the economy to be gained too minimal, to warrant such an abridgement of the disciplinary process.

Obviously, Missouri rejects this principle. As the Illinois Supreme court pointed out in *Owens* citing *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322 (1979), the offensive use of collateral estoppel in disciplinary proceedings is not "fair". Several of the "factors" under the "fairness" doctrine of the (Restatement 2d of Judgments) clearly are not present including:

3. There *are* different burdens of persuasion in the instant case and in a "sanctions" case;
5. The issue as litigated is incompatible with the applicable administrative scheme;
8. Application of "collateral estoppel" will complicate the proceedings, not simplify them.

Given these principles of "fairness" it is clear the following rejected evidence should have been considered:

(1) Evidence regarding the facts giving rise to the underlying sanctions to show both that they are not as found by the sanctioning courts *and* that they do not constitute violations of the Missouri Code of Professional Conduct.

(2) Evidence from "experts" on whether the actions of Petitioner were appropriate at the time they were made by her and therefore

whether at the time they constituted violations of the Missouri Code of Professional Conduct.

(3) Evidence on the problems with Rule 11 and the climate of trying employment cases in the 1980's and early 1990's.

(4) Evidence from various studies to show that sanctions in the late 1980's and early 1990's under Rule 11 were unduly weighted against plaintiff civil rights lawyers and employment lawyers, such as Petitioner, and/or were the result of gender bias in the courts.

(5) Evidence regarding Judge Whipple's on record opinion of Title VII, plaintiffs, and their attorneys who bring these actions.

(6) Evidence of bias by the courts in the awarding of Rule 11 sanctions, by the judges (*including the judges involved in the sanction matters*) and in their treatment of women lawyers, including Petitioner and her women clients.

Petitioner believes the short changing of due process in her case led to her disbarment and therefore her disbarment should be vacated.

III. IS DISBARMENT UNDER THE CIRCUMSTANCES OF THIS CASE AN EXCESSIVE CIVIL FINE IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

Hudson, supra clearly states that although a penalty may not be "double jeopardy" it may be so excessive as to be in violation of an individual's right to be free of excessive punishment. *Hudson*, 118 S. Ct. 488, 495-96. The evidence is unequivocal Petitioner has not engaged in any sanctionable conduct for almost six years and that most of the acts occurred in the time period 1988-1990, almost eight years ago. There were extensive mitigating circumstances. Clearly to disbar Petitioner given the lack of any recent conduct is an excessive fine.

Petitioner also argues that if this Court accepts the proposition that ethical violations did in fact occur, which Petitioner does not concede but accepts for purposes of this argument, that the Master's Findings were appropriate and that the Missouri Supreme Court's disregard of the Master's findings was inappropriate based upon the record before it. The Master found in part:

After review of the evidence presented and hearing, this Master has determined that based upon orders of federal courts imposing sanctions upon Respondent, she has committed some violations of the Missouri Code of Professional Conduct. Respondent, however, has historically practiced almost exclusively in the federal courts of this state and Kansas and the federal courts of appeal. She has been sanctioned by those Courts, and they have chosen not to discipline her further. Consequently, this Master finds that Respondent should receive the minimum available sanction of a reprimand.

* * *

While this Master does not find there are any "aggravating circumstances" present, he does find that there are numerous "mitigating circumstances" supporting leniency, including the adverse effects on both Respondent's health and her finances resulting from the sanctions she has been required and still is being required to pay by the federal courts. It is therefore the considered recommendation of this Master to the Supreme Court that the minimum sanction of a reprimand be imposed upon Respondent.

* * *

Mitigating Factors

The Respondent has made a substantial case for mitigation of any penalties in this case. As noted above, she has already suffered substantially personally, professionally and financially. Additionally, her clients past and present, persons who have worked for her and members of the Bar in Kansas and Missouri have spoken highly of her professionally — both ethically and in her knowledge of the law. A lawyer who sits on the Johnson County Ethics Committee also testified that in her belief Respondent had acted ethically with regard to the White case. Additionally, it is clear that this matter is not over for Respondent. Apparently, she will continue to "pay" for her previous conduct both monetarily, and in dealing with potential clients, clients and opposing counsel. In reading the various sanction orders it is also clear that Respondent never repeated the same conduct twice once

she had been sanctioned for a particular item. Likewise, a substantial time has passed since Respondent was last sanctioned during which period she has not been sanctioned by any Court.

Despite the ability of the District Courts to deny Respondent the right to practice before them, this Master notes that no District or Appellate Court Disciplinary Committee has forbidden Respondent to practice before it. Finally, the Complainant although it claimed it would offer testimony from members of the bar and the Judges involved in some of the sanctions, offered no evidence whatsoever to rebut any of the evidence offered in mitigation. Taken together, the record is such that this Master finds the mitigating circumstances in this case are such that Respondent has been punished sufficiently for her transgressions and that therefore she should receive the minimum available sanction of a reprimand.

It should be noted that none of Respondent's behavior harmed her client or any other member of the public.

Finally, the primary purpose of a disciplinary action is not to punish the offender, but to protect the public. Based upon the evidence adduced, this Master finds that discipline would only serve to punish the Respondent and would do nothing to protect the public given the nature of the sanctions and the commitment of Respondent to serving the public as demonstrated by ample testimony from her clients and lawyers in the community.

CONCLUSION

Petitioner requests that certiorari be granted on each of the three questions presented and that:

Petitioner requests this Court find that the Petitioner's disbarment in the Missouri Supreme Court is barred by the "Double Jeopardy Clause's" guarantee against twice being punished for the same offense afforded by both the Fifth Amendment to the United States Constitution and Article I, Section 19 of the Missouri Constitution and therefore should be vacated.

Petitioner additionally and alternatively requests this Court find that her disbarment in the Missouri Supreme Court was in violation of the due process requirement at the Fourteenth Amendment to the United States Constitution and that her disbarment should be vacated and remanded for new proceedings consistent with the requirements of due process.

Petitioner, alternatively and additionally, requests this Court find that her disbarment in the Missouri Supreme Court violates the Eighth Amendment to the United States Constitution as it is an excessive fine and punishment given the events, the passage of time and that therefore her disbarment should be reduced to a reprimand consistent with the Master's findings or vacated in its entirety.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORIGINAL DISCIPLINARY PROCEEDING OF THE SUPREME COURT OF MISSOURI FILED NOVEMBER 25, 1997

SUPREME COURT OF MISSOURI

en banc

No. 77586

IN RE:

GWEN G. CARANCHINI,

Respondent.

ORIGINAL DISCIPLINARY PROCEEDING

This is an original disciplinary proceeding filed in four counts. The Chief Disciplinary Counsel ("Informant") charges Gwen G. Caranchini ("Respondent") with numerous violations of the Missouri Rules of Professional conduct ("Missouri Rules") based upon Respondent's misconduct in four separate federal court cases. The federal courts have sanctioned Respondent for her misconduct. After consideration of the propriety of sanctions under the Missouri Rules based on the findings of misconduct in those federal cases, this Court orders that Respondent be disbarred.

Upon the filing of the formal information in this Court the Honorable David L. Busch was appointed as special master. After hearing, the master determined that numerous violations had occurred, but recommended only that the Respondent be reprimanded. Nonetheless, "[i]n a disciplinary proceeding, the master's findings of fact, conclusions of law, and

recommendation are advisory." *In re Charton*, 918 S.W.2d 257, 159 (Mo. banc 1996). This Court reviews the evidence *de novo* and draws its own conclusions based upon the weight of the evidence. *Id.* Because the charges against Respondent are derived from federal court findings, this Court must determine whether those factual findings constitute violations of the Missouri Rules. Before considering specific rule violations and appropriate sanctions, however, two threshold issues regarding the propriety of basing state disciplinary action on federal court findings must be addressed: 1) the application of offensive non-mutual collateral estoppel in state disciplinary actions, and 2) the impact of the double jeopardy prohibition on successive federal and state disciplinary actions.

I. OFFENSIVE NON-MUTUAL COLLATERAL ESTOPPEL

Respondent claimed in the proceeding before the master, and continues to claim before this Court, that she is entitled to a hearing on the underlying facts of the federal sanction decisions. The master determined that the doctrine of offensive non-mutual collateral estoppel precludes Respondent from relitigating the federal courts' factual determinations. This Court agrees.

A. Application of Offensive Non-Mutual Collateral Estoppel in Disciplinary Proceedings

The collateral estoppel doctrine precludes parties from relitigating issues of ultimate fact that have previously been determined by a valid judgment. *King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 500 (Mo. banc 1991). Traditionally, collateral estopppel was limited by the concept of mutuality, which meant

that a judgment could not be used for estoppel purposes unless both parties had been parties to the original judgment. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326-27 (1979). However, this Court has since abandoned the mutuality requirement. *Board of Educ. v. City of St. Louis,* 879 S.W.2d 530, 532 (Mo. banc 1994); *Helm v. Wismar,* 820 S.W.2d 495, 498 (Mo. banc 1991); *Oates v. Safeco Ins. Co. of America,* 583 S.W.2d 713, 719 (Mo. banc. 1979). Although collateral estoppel is more commonly invoked by defendants, it is also used by plaintiffs "offensively" to estop defendants from relitigating issues that have been determined by a prior valid judgment. *Parklane Hosiery,* 439 U.S. at 329. This Court has also approved a variation of the doctrine called offensive non-mutual collateral estoppel that may be invoked where the plaintiff was not a party to the earlier judgment. *Helm,* 820 S.W. 2d at 498; *Oates,* 583 S.W.2d at 719.

Although this Court has not directly and explicitly addressed the application of offensive non-mutual collateral estoppel in the context of disciplinary actions, it has done so at least implicitly. For instance, respondents in disciplinary actions are not allowed to relitigate their guilt nor pursue theories of defense that have previously been rejected in underlying criminal proceedings. *In re McBride,* 938 S.W. 2d 905, 907 (Mo. banc 1997); *In re Lurkins,* 374 S.W.2d 67, 68 (Mo. banc 1964). In other cases, both federal court findings and disciplinary orders of another state have been used as the basis for disciplinary actions in this state. *In re Storment,* 873 S.W.2d 227, 230 (Mo. banc 1994) (foreign state disciplinary order can serve as the basis for discipline in Missouri); *In re Frick,* 694 S.W. 2d 473, 477-78 (Mo. banc 1985) (federal court findings are binding in state disciplinary proceedings).

Nevertheless, Respondent argues that this Court must engage

in an independent review of the evidence and claims that use of the federal court findings constitutes imposition of "automatic discipline" under the Missouri Rules. Although Respondent correctly notes that this Court engages in *de novo* review of the evidence in a disciplinary proceeding, In re Disney, 922 S. W. 2d 12, 13 (Mo. 1996), she fails to recognize that the federal court findings are themselves the evidence in this case and that *de novo* review consists of a review of those findings. This Court need only review the federal court findings and determine whether those findings support disciplinary action under Missouri Rules. This approach is no different from this Court's prior decisions holding that foreign disciplinary orders do not require discipline in Missouri, but may serve as the basis for disciplinary actions. *Storement*, 873 S.W. 2d at 230; In re Weiner, 530 S.W.2d 222, 224 (Mo. banc 1975). In other words, the federal court sanctions have not been used as a basis for automatic discipline; the facts found in the federal proceedings have merely been used to make an independent determination of whether the Missouri Rules have been violated.

B. Application of Offensive Non-Mutual Collateral Estoppel in the Instant Case

Respondent contends that even if the doctrine of offensive non-mutual collateral estoppel applies in disciplinary proceedings, the requirements of the doctrine were not met in this case. In this regard, four factors should be considered when applying non-mutual collateral estoppel: 1) the identity of the issues involved in the prior adjudication and the present action, 2) whether the prior judgment was on the merits, 3) "whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, " and 4) whether the party had a full and fair opportunity in the prior adjudication to litigate the issue for which collateral estoppel is asserted. *Oates*, 583 S.W.2d at 719. Respondent concedes that

the second and third factors were present, so this Court will limit its discussion to the first and fourth factors.

1. Identity of the Issues

The very basis of collateral estoppel is the notion that once particular facts have been determined by a valid judgment, a party to that judgment cannot later relitigate those same facts in a subsequent lawsuit. *State v. Rodden*, 728 S.W.2d 212, 220 (Mo. banc 1987) Thus, identity of the factual issues is a critical factor for applying the doctrine of collateral estoppel. *Id.* Respondent Claims that there is no identity of issues in the instant case because the federal decisions dealt with violations of the Federal Rules while this disciplinary action concerns violations of the different Missouri Rules. Once Again, Respondent misconstrues the manner in which the federal decisions are being used. Collateral estoppel is being applied to the factual findings of the federal courts and not to the actual federal court sanctions. The factual findings of the federal courts clearly concern the very same conduct that is the basis for this disciplinary action; therefore, the identity of issues requirement is satisfied.

2. Full and Fair Opportunity to Litigate the Issues in Prior Litigation

Collateral estoppel can only be used to preclude a party from relitigating issues if that party had a full and fair opportunity to litigate those issues in a prior case. *Helm*, 820 S.W.2d at 498. This requirement of fairness is especially significant when a party that was not involved in the prior suit is seeking to preclude relitigation of issues through application of non-mutual collateral estoppel. *Oates*, 583 S.W.2d at 719.

Respondent offers two reasons why the "full and fair opportunity" requirement of the collateral estoppel doctrine is not met in this case. First, she argues that she was not given notice that the federal court sanctions would result in automatic imposition of state discipline. Second, she claims that the federal courts did not provide her with sufficient process in reaching their decisions that would also support imposition of discipline under the Missouri Rules. As to Respondent's first point, she again fails to recognize that this Court has not adopted the federal court sanctions, but has merely adopted the federal court's factual findings. Respondent was on notice that the federal courts were making factual findings regarding her misconduct, and such notice was sufficient to allow her a full and fair opportunity to vigorously dispute those facts, With regard to Respondent's second point, she was granted an opportunity to respond to the allegations of misconduct in each of the four federal cases either by a hearing or by submission of briefs. *Platt v. Jack Cooper Transp., Co.,* 959 F.2d 91, 96 (8th Cir. 1990); *White v. General Motors Corp.,* 908 F.2d 675, 686 (10th cir. 1990); *Pope v. Federal Express Corp.,* 138 F.R.D. 675, 676 (W.D. Mo. 1990); *Perkins v. General Motors Corp.,* 129 F.R.D. 655, 657 (W.D. Mo. 1990).

In addition, Respondent maintains that she has never had the opportunity to litigate the issue of whether she has violated the Missouri Rules. She is again mistaken. The hearing before the master and the proceedings before this Court afford her that opportunity. Although Respondent has not been allowed to relitigate the factual findings of the federal courts, she has been given a full opportunity to litigate the issue of whether those factual findings justify discipline under the Missouri Rules.

Finally, Respondent contends that she has not had the opportunity to litigate numerous defenses because the master

found that she was collaterally estopped from engaging in discovery regarding the issues that had been decided by the federal courts. In fact, Respondent was only denied the opportunity to litigate those defenses pertaining to the federal court factual findings, and the master was correct in denying Respondent the opportunity to engage in extensive discovery regarding those facts. Under these circumstances, Respondent has had a full opportunity to litigate the charges against her.

In sum, the application of offensive non-mutual collateral estoppel in this case is consistent with the underlying principles of protecting litigants from the burden of relitigating issues and the promotion of judicial economy. *Parklane Hosiery*, 439 U.S. at 326. Under this doctrine, the federal court findings have properly been used as the basis for this disciplinary action.

II. DOUBLE JEOPARDY

Respondent's next point is that the double jeopardy clause of the federal and state constitutions prohibits further disciplinary action by this Court because the federal courts have already sanctioned her for her misconduct. The federal court sanctions combined with separate state disciplinary sanctions, she explains, constitute multiple punishments for the same offenses. Even assuming, *arguendo*, that the federal court sanctions do constitute punishment for double jeopardy purposes, this Court holds that state disciplinary actions do not. Without state punishment, therefore, no double jeopardy violations exists.[1]

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1. Because we find that state disciplinary action is not punishment for double jeopardy purposes, it is unnecessary to address the distinct possibility that the dual sovereignty doctrine also prevents application of the double jeopardy clause. *See generally, Health v. Alabama*, 474 U.S. 82, 88-89 (1985); *State v. Durham*, 822 S.W. 2d 453, 453, 454 Mo. App. 1991).

Appendix A

The United States Supreme Court has recognized that the determination of whether a civil penalty is considered *punishment* for purposes of double jeopardy analysis depends upon whether the penalty is remedial or punitive in nature. *United States v. Ursery*, __ U.S. __, 116 S.Ct. 2135, 2145-46 n.2 (1996); *United States v. Halper*, 490 U.S. 435, 447-49 (1989). A civil penalty is only considered *punishment* under the double jeopardy clause when it "may not fairly be characterized as remedial, but only as a deterrent or retribution." *Ursery*, 116 S.Ct. at 2145 n.2; *Halper*, 490 U.S. at 449. It is incumbent on this Court, therefore, to assess whether attorney discipline is primarily remedial or punitive.

In that regard, this Court has repeatedly recognized that disciplinary actions are intended to protect the public and not to punish the individual attorney. *In re Coe*, 903 S.W.2d 916, 918 (Mo. banc 1995); *In re Harris*, 890 S.W. 2d 299, 302 (Mo. banc. 1994); *In re Westfall*, 808 S.W. 2d 829, 836 (Mo. banc 1991). This is not to say that disciplinary actions have no punitive component. But, the overriding principle of disciplinary action is to "protect society and maintain the integrity of the legal profession." *In re Grank*, 885 S.W.2d 328, 333 (Mo. banc 1994). Thus, disciplinary actions are primarily remedial in nature.

It is true, as Respondent points out, that the Supreme Court has previously referred to disbarment as a *punishment*. *In re Ruffalo*, 390 U.S. 544, 550 (1968) ("Disbarment, designed to protect the public, is a *punishment* or *penalty* imposed on the lawyer.") (emphasis added). However, the *Ruffalo* decision's use of the term *punishment* was synonymous with the term *penalty* and did not imply that disbarment was *punishment* for purposes of double jeopardy analysis. *Id.* As stated, the prior decisions of this court clearly indicate that state attorney disciplinary action is primarily remedial in nature. As such, it

does not constitute *punishment* for purposes of double jeopardy analysis. Thus, the double jeopardy prohibition is not applicable because Respondent has not been subjected to two *punishments* for the same misconduct.

III. SANCTIONABLE MISCONDUCT

Having determined that federal court findings are an appropriate basis for state disciplinary action and that state attorney disciplinary actions do not constitute punishments that come within the purview of the double jeopardy prohibition, this Court must now consider the specific charges against Respondent. Because the individual counts are based respectively on the separate federal court cases, this Court will examine each federal case separately to determine if violations of the Missouri Rules follow from the federal court findings.

A. Count One: White v. General Motors Corporation

In *White v. General Motors Corp.*, 699 F.Supp. 1485 (Kan. 1988), Respondent represented two clients, Frederick White ("White") and Benjamin Staponski ("Staponksi"), who brought claims against General Motors Corporation ("GM") for wrongful discharge and breach of contract. White also brought a separate claim against GM for slander. The district court found insufficient legal and factual bases to support these claims and ordered summary judgment for GM. Subsequently, the district court imposed sanctions against Respondent after finding that she had engaged in numerous acts of misconduct. *White v. General Motors Corp.*, 126 F.R.D. 563 (Kan. 1989). The district court's findings in the *White* case may be summarized as follows:

1. Respondent failed to make reasonable factual inquiry before filing the wrongful discharge

complaint. *Id.* at 565. Both of her clients had previously executed documents releasing GM from employment-related claims, and she knew of the existence of the releases before she filed the wrongful discharge complaint. *Id.* Nevertheless, she filed the wrongful discharge complaint without first obtaining copies of the releases. *Id.*

2. Respondent pursued White's slander claim without making a reasonable inquiry to determine whether that claim was well-founded in fact. *Id.* at 656-66. The only proposed witness to the alleged slander had stated in an affidavit that she had not spoken with GM regarding White, but Respondent continued to press this claim after the affidavit had made it apparent that there was no factual basis to do so. *Id.*

3. Respondent disregarded well-established Kansas law by arguing that the determination of whether the facts surrounding the signing of the release constituted duress was initially a jury question, rather than a question of law. *Id.* at 566. Respondent's attempt to distinguish the court's previous decision on this issue was "specious" because it presented "a distinction without a difference." *Id.* In this way, Respondent advanced her claims without having a reasonable basis to believe that those claims were well-founded in law. *Id.*

4. Respondent's argument that the releases signed by plaintiffs were ambiguous, which was her excuse for continuing to use the releases, was not well-founded in fact or law. *Id.* Although she claimed

that the releases were unclear regarding claims unknown at the time the releases were entered, the releases unequivocally discharged any and all claims, known or unknown. *Id.*

5. Respondent advanced the action for an improper purpose, not only by filing suit, but also by threatening to contact the media and government agencies before suit was ever filed. *Id.* at 567. The improper purpose was evident by the fact that she had failed to make a reasonable inquiry to determine that the claims were well-founded. *Id.*

6. Respondent needlessly increased the cost of litigation by making voluminous discovery requests that would not have been necessary had she made a reasonable inquiry to determine that the claims were well-founded in the first place. *Id.*

Based on these findings, the district court ordered Respondent to pay GM's costs and attorney's fees totaling $172,382.19. *White v. General Motors Corp.*, 908 F.2d 675, 678 (10th cir. 1990). The Tenth Circuit affirmed the district court's findings but remanded for reconsideration of the appropriate amount of sanctions. *Id.* at 683. On remand, the district court reduced the amount of sanction to $50,000, *White v. General Motors Corp.*, 139 F.R.D. 178, 183 (Kan.1991), and the Tenth Circuit affirmed the sanction on appeal. *White v. General Motors.*, 977 F.2d 499, 503 (10th Cir. 1992).

Informant charges in Count 1 that the conduct for which Respondent was sanctioned in the *White* case also constitutes a violation of Rules 4-3.1, 4-3.2, 4-8,4(a), and 4-8.4 (d) of Missouri Rules.

Appendix A

Rule 4-3.1 forbids an attorney from bringing a proceeding or asserting an issue unless there is a non-frivolous basis for doing so. A claim "is not frivolous merely because the facts have not first been fully substantiated." Rule 4-3.1 (Comment). However, continuing to pursue a claim once it becomes apparent that there is no factual basis to support that claim is clearly contrary to the requirements of the rule. By pursuing White's slander claim even after it became apparent that there was no factual basis for that claim, Respondent violated Rule 4-3.1.

Rule 4.3.2 requires an attorney to "make reasonable efforts to expedite litigation." In the *White* case Respondent 1) filed a wrongful discharge claim without first obtaining copies of the employee releases knowing that they existed, 2) pursued a slander claim after it had become apparent that there was no factual basis for the claim, 3) pursued issues of duress and ambiguity that were not well-founded in law, and 4) engaged in voluminous discovery to support claims that were not well-founded in fact or law. By engaging in that conduct, Respondent failed to "make reasonable efforts to expedite litigation" and thus violated Rule 4-3.2.

Rule 4-8.4(a) states that "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct." By violating Rules 4-3.1 and 4-3.2, Respondent has necessarily violated rule 4-8.4(a). *See In re Oberhellmann,* 873 S.W.2d 851, 854 (Mo. banc 1994).

Rule 4-8.4(d) states that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." By engaging in the conduct that constituted violations of Rules 4-3.1 and 4-3.2, Respondent also violated Rule 4-8.4(d).

B. Count Two: Pope v. Federal Express Corporation

In *Pope v. Federal Express Corp.*, 138 F.R.D. 675 (W.D. Mo. 1990), the court found that Respondent attempted to use a forged document to support the plaintiff's sexual harassment claim. *Id.* at 680-82. This document was a computer generated report on which a forged handwritten note had been added. The note read: "Carol, you *"feel"* good! Danny." *Id.* at 677. The court also found that Respondent continued to rely on this document as support for her client's claim long after she learned that the document was a forgery. *Id.* at 683. In particular, she continued to engage in discovery, filed amended designations of experts, and submitted supplemental deposition testimony. *Id.* at 681. After rejecting Respondent's theory that the forged document was manufactured by some unknown person in an attempt to discredit her client, *Pope v. Federal Express Corp.*, 138 F.R.D. 684, 688-89 (W.D. Mo. 1991), the court imposed monetary sanctions of $30,000. *Id.* at 690. The Eighth Circuit affirmed the district court's findings regarding Respondent's sanctionable conduct, but remanded for reconsideration of the appropriateness of the sanction. *Pope v. Federal Express Corp.*, 974 F.2d 982, 983-85 (8th Cir. 1992). Subsequently, the Eighth Circuit affirmed the district court's reduced sanction of $25,000 noting that Respondent "knowingly offered a falsified document into evidence." *Pope v. Federal Express Corp.*, 49 F.3d 1327, 1328 (8th Cir. 1995).

Informant charges in Count II that Respondent has violated rules 4-3.1, 4-3.2, 4-33.3(a)(4), 4-3.4(b), 4-8.4(a), 4-8.4(c), and 4-8.4(d) of the Missouri Rules.

This Court holds that Respondent violated Rule 4-3.1 by pursuing a claim that lacked a non-frivolous basis because she

persuade her client's claim after it had become apparent that the claim was not well-founded in fact. Respondent also violated Rule 4-3.2 by failing to "make reasonable efforts to expedite litigation," because she continued to engage in discovery and to file documents with the court after it had become apparent that her client's claims was not well-founded in fact.

Respondent also violated Rule 4-3.3(a)(4), which forbids a lawyer from "knowingly . . . offer[ing] evidence that the lawyer knows to be false" and requires a lawyer to "take reasonable remedial measures" if the "lawyer has offered material evidence and comes to know of its falsity." Not only did Respondent fail to take remedial measures when she became aware that the document was a forgery, but also she continued to make use of the document by offering it as evidence.

Further, Respondent violated rule 4-8.4(c), which states that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation," by continuing to depend upon a document that she knew to be a forgery. Respondent also violated Rules 4-8.4(a) and 4-8.4(d) by committing multiple rule violations and by engaging in conduct that is prejudicial to the administration of justice.

Informant also charged Respondent with a violation of Rule 4-3.4(b), which forbids a lawyer from falsifying evidence. Although Respondent certainly used the manufactured document in the proceedings, the *Pope* court did not find that she manufactured the document or assisted anyone in manufacturing the document. Because the origins of the manufactured document remain unclear, this Court finds no violation of Rule 4-3.4(b).

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C. Count Three: Perkins v. General Motors Corporation

In *Perkins v. General Motors Corp.*, 129 F.R.D. 655 (W.D. Mo. 1990), Respondent represented her client in bringing a Title VII claim against GM. *Id.* at 656. After the court had reached a final judgment on the underlying claim, the court considered defendant's motion for sanctions and found that Respondent had engaged in numerous acts of misconduct. *Id.* at 656-57. The following is a brief summary of the district court's findings in the *Perkins* case:

> 1. Respondent made unsupported allegations that a GM manager had been the subject of prior sexual harassment charges. *Id.* at 660-62. She raised these allegations of misconduct in correspondence and interrogatories, as well as at trial, although she had failed to make a reasonable inquiry into the charges and had never produced any factual basis in support. *Id.*
>
> 2. Respondent made an affirmative misrepresentation regarding the date when she learned that a potential party's place of residence had changed. *Id.* at 663. Respondent stated in support of a motion to join that party that she had only recently learned that the party had moved out of Missouri. *Id.* Her statements were a misrepresentation, however, because she had indicated her knowledge of the party's relocation in a suit the year before. *Id.*
>
> 3. Respondent intentionally withheld the name of a senior GM manager who could potentially serve as a significant witness in her client's case. *Id.* at

664-66. Respondent failed to disclose the senior manager's name in response to GM's interrogatories and failed to later amend her responses to those interrogatories, all in an attempt to surprise GM at trial. *Id.* at 665-66.

4. Respondent deliberately misrepresented her ability to connect the testimony of several witnesses to her client. *Id.* at 669. The Court had advised Respondent that she could present testimony of witnesses regarding the work environment at GM only if she showed that her client was aware of the experiences of those witnesses. *Id.* She then presented several work environment witnesses with the assurance that she would connect those witnesses with her client's case, but she failed to make that connection with most of those witnesses. *Id.* In fact, no reasonable basis existed for asserting that she could connect those witnesses to her client. *Id.*

5. Respondent filed a refusal motion that had no reasonable basis in fact or law. *Id.* at 672.

The Eighth Circuit subsequently affirmed the district court's findings regarding all aspects of Respondent's misconduct. *Perkin's v. General Motors Corp.*, 965 F.2d 597, 600-02 (8th Cir. 1992).

As a result of this misconduct, Informant charges in Count III that Respondent has violated Rules 4-3.1, 4-3.2, 4-3.3(a)(1), 4-3.4(a), 4-3.4(d), 4-8.4(a), and 4-8.4(d) of the Missouri Rules.

This Court holds that Respondent violated Rule 4-3.1 by 1) alleging the misconduct of a GM manager when that allegation

had no factual support and 2) filing a frivolous recusal motion that lacked any basis in fact or law.

Respondent also violated Rule 4-3.2 by misrepresenting her knowledge of a potential party's residence and by withholding the identity of a witness in an attempt to surprise GM at trial. These actions prevented expeditious litigation by complicating the proceedings and causing unnecessary delays. *Perkins*, 129 F.R.D. at 664.

Rule 4-3.3(a)(1) states that "[a] lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal." Respondent violated this rule by falsely representing to the court that she lacked knowledge of a potential party's change of residence and by falsely representing that she could connect the testimony of work environment witnesses to her client.

Rule 4-3.4(a) states that "[a] lawyer shall not . . . unlawfully obstruct another party's access to evidence." Respondent violated this rule by intentionally withholding the name of a potentially helpful witness in an attempt to surprise the defendant at trial.

Rule 4-3.4(d) states that "[a] lawyer shall not . . . fail to make reasonably deligent effort to comply with a legally proper discovery request by an opposing party." Respondent violated this rule by failing to deligently answer GM's interrogatories with disclosure of the name of a GM employee believed to have knowledge that could be imputed to GM.

The instances of Respondent's misconduct that have resulted in violations of the above noted rules also constitute violations of Rules 4-8.4(a) and 4-8.4(d).

D. Count Four: Platt v. Jack Cooper Transport

In *Platt v. Jack Cooper Transport, Co.*, 959 F.2d 91 (8th Cir. 1992), the Eighth Circuit found that Respondent had previously filed a frivolous sanctions motion against opposing counsel in the trial court and was pursuing a frivolous appeal from the denial of that motion. *Id.* at 96. The court also found that Respondent's actions were detrimental to her own client and noted that her actions were apparently based upon Respondent's personal animosity towards the district court judge and opposing counsel. *Id.* For this misconduct, the court imposed sanctions of $2500. *Id.* at 96-97.

Informant charges in this final Count that Respondent has violated Rules 4-3.1, 4-3.2, 4-8.4(a), and 4-8.4(d) of the Missouri Rules. We hold that Respondent violated Rule 4-3.1 by pursuing the sanction motion and appeal, which were proceedings for which she lacked a non-frivolous basis. In addition, Respondent violated rule 4-3.2 because the frivolous sanctions motion and the frivolous appeal prevented the expeditions litigation of the case. Finally, the instances of Respondent's misconduct that constitutes violations of the above noted rules also establish violations of Rules 4-8.4(a) and 4-8.4(d).

IV. THE SANCTION

Respondent's commission of numerous violations of the Missouri Rules requires determination of the appropriate sanction. As a preliminary matter, the Court again emphasizes that "[t]he purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession." *Disney*, 922 S.W. 2d at 15 (Mo. banc 1996). In order to further this purpose, "[t]his Court is authorized to administer four types of discipline:

reprimand; indefinite suspension; suspension for a fixed period; and disbarment." *Frank,* 885 S.W. 2d at 333 (Mo. banc 1994). Because disbarment is the most severe of these sanctions, it has typically been reversed for those instances where an attorney is clearly unfit to continue to practice law. *Disney,* 922 S.W.2d at 15; *Frank,* 885 S.W.2d at 334.

During the two day hearing before the master, Respondent submitted a substantial amount of mitigation evidence that can generally be characterized as pertaining to one of two relevant issues: 1) her character and reputation in the legal profession and 2) the previous sanctions imposed by the federal courts. **ABA Standards for Imposing Lawyer Sanctions,** Rules 9.32(g) and 9.32(k) ("**ABA Standards**"). As to the first class of mitigation evidence, Respondent submitted the testimony of numerous clients and colleagues regarding her character and reputation as well as numerous documents indicating various contributions she has made to the legal profession. Regarding the second class of mitigation evidence, Respondent testified about the negative impact that the federal court sanctions have had on her both personally and professionally.

Respondent also offered other evidence during the hearing before the master that does not qualify as mitigating evidence. In particular, she presented testimony of other attorneys regarding the propriety of her actions in the federal courts. However, this testimony was nothing more than a veiled attempt to collaterally attack the underlying federal court findings and is given no effect due to the application of collateral estoppel. She also testified about her 18 years of experience in the legal profession and 11 years in her area of specialization. Her ample experience is, however, an aggravating factor, if anything: it is inexperience that would perhaps serve as a mitigating factor. **ABA Standards** Rule 9.32(f). Additionally, Respondent

testified that she had not been subject to any further sanctions since the federal court sanctions mentioned in this decision. Due to Respondent's continuing refusal to acknowledge her wrongdoing, though, this record does not serve as a strong indicator of interim rehabilitation or remorse. **ABA Standards** Rules 9.32(j) and 9.32(l). Finally, in addition to presenting proper mitigation evidence regarding the negative impact of the federal sanctions, as mentioned above, Respondent also presented evidence intended to show that the sanctions exceeded the amount that she was able to pay. This evidence directly contradicts the federal court finding about her ability to pay, and collateral estoppel again precludes this Court's reconsideration of those findings.

Aggravating circumstances are also applicable in this case. Significantly, Respondent's actions in the federal courts consist of multiple offenses that tend to show a pattern of misconduct. **ABA Standards** Rules 9.22(c) and 9.22(d). Also, as noted above, Respondent's substantial experience in the legal profession weighs against her in these disciplinary proceedings rather than in her favor. **ABA Standards** Rule 9.22(i).

Ultimately, this Court's decision must turn on the precedent that when an attorney, with an intent to deceive the court, submits a false document, makes a false statement, or withholds material information, disbarment is the appropriate sanction. *Oberhellmann*, 873 S.W.2d at 856; *Storment*, 873 S.W.2d at 231; **ABA Standards** Rule 6.11. A lesser sanction of suspension or reprimand may be appropriate where the attorney merely knows of the misrepresentation or is merely negligent in allowing the misrepresentation to occur. **ABA Standards** Rules 6.12 and 6.13. But, the record in this case clearly establishes that Respondent intentionally submitted a false document, intentionally made false statements, and intentionally

withhold information. This misconduct is an affront to the fundamental and indispensable principle that a lawyer must proceed with absolute candor towards the tribunal. In the absence of that candor, the legal system cannot properly function. Unfortunately, Respondent has shown a consistent willingness to forego this duty of candor to the tribunal. Her mitigating evidence does not serve to remedy this critical shortcoming. Under these circumstances, the protection of the public and the maintenance of the integrity of the legal profession require the most severe sanction available.

This Court orders Gwen G. Caranchini disbarred. Costs taxed to Respondent.

Stephen N. Limbaugh, Jr., Judge

All concur.

APPENDIX B — DISCIPLINARY PROCEEDING OF THE SUPREME COURT OF MISSOURI DATED SEPTEMBER 25, 1997

IN THE SUPREME COURT OF MISSOURI

September 25 Session, 1997

No. 77586

In re: Gwen G. Caranchini,

(DISCIPLINARY PROCEEDING)

Now at this day, come the parties aforesaid, the Informants by their attorney, and the Respondent by her attorneys, and the Court having considered the findings of fact and recommendations to the Court filed by the Master, the Honorable David L. Busch, who held a hearing and filed his report; and thereafter, the above-entitled cause having been fully briefed, argued and submitted to the Court; and the Court now being sufficiently advised of and concerning the premises, it is ordered that the Respondent be, and she is hereby disbarred, her right and license to practice law in the State of Missouri is canceled and her name be stricken from the roll of attorneys in this State. It is further ordered that the said Gwen G. Caranchini comply in all respects with Missouri Supreme Court Rule 5.27 — Notification of clients and counsel. Costs taxed to Respondent.

(opinion filed)

APPENDIX C — CONSTITUTIONAL PROVISIONS RULES AND STATUTES INVOLVED

MISSOURI CONSTITUTION, ARTICLE I, SECTION 19

§ 19. Self-incrimination and double jeopardy

That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; but if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court; and if judgment be arrested after a verdict of guilty on a defective indictment or information, or if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to law.

MISSOURI SUPREME COURT RULES 5.19 AND 5.20

RULE 5.19 PROCEDURE FOLLOWING DISCIPLINE OF A DISCIPLINARY HEARING PANEL

(a) After a hearing a disciplinary hearing panel may find that the information should be dismissed, a written admonition should be administered to the respondent, or that further proceedings are warranted. If a written admonition is administered to the respondent, it shall be served upon the respondent as provided in Rule 5.18. Within fifteen days of the receipt of the adomnition, the respondent so admonished shall accept or reject the admonition in writing. If accepted, the written admonition shall be come part of the record. Failure of the respondent to timely respond in writing is an acceptance of the admonition.

(b) If the admonition is rejected, the disciplinary hearing panel shall render a written decision within fifteen days of receipt of the rejection or within the time provided for a decision in Rule 5.16, whichever is later. The decision shall include the findings and recommendations required by Rule 5.16. If the admonition is rejected, the admonition shall not be used as evidence or otherwise for any purpose, except as provided in Rule 5.31.

(c) If the disciplinary hearing panel after a hearing recommends discipline and the parties concur in the panel's written decision, the parties shall file with this Court a copy of the panel's decision and a written stipulation of their concurrence in the panel's written decision including the recommendation for discipline. The stipulation shall be filed in this Court within thirty days after the date of the panel's decision. If the Court concurs in the panel's recommendation of discipline, the discipline shall be imposed without further hearing or proceeding.

(d) If the parties do not file a written stipulation within thirty days after the date of the panel's decision or if this Court does not concur with the panel's decision, the chief disciplinary counsel shall file in this Court the complete record made before the disciplinary hearing panel within thirty days after the deadline for filing a stipulation or as otherwise ordered by this Court. The matter shall be briefed and argued in this Court as though a petition for an original remedial writ has been sustained. If this Court finds for the respondent, it shall dismiss the information. If this Court finds the professional misconduct charged in the information, it shall impose appropriate discipline.

(e) When requested by the respondent, and upon a showing of financial inability to employ counsel, this Court shall appoint counsel to represent the respondent in this Court. Compensation

shall be fixed by this Court and shall be payable from the Advisory Committee Fund.

(f) If the respondent is a member of the bar of this state and is also licensed in any other state, a copy of this Court's decision to discipline shall be forwarded to the chief disciplinary counsel, who shall forward the decision to the appropriate disciplinary authorities of the other states wherein the respondent is licensed. If the respondent is a member of the bar of another state and not of this state, and the charges are found to be true, this Court shall render a judgment finding respondent guilty and shall reprimand the respondent or enjoin the respondent from practicing law within the state of Missouri for a time fixed in the discretion of this Court. A copy of this Court's order shall be forwarded to the chief disciplinary counsel, who shall forward the order to the appropriate disciplinary authorities of the states wherein the respondent is licensed.

(g) Costs in the matter shall be taxed as this Court, in its discretion, may order.

(Adopted June 20, 1995, effective Jan. 1, 1996. Amended March 12, 1996, effective April 1, 1996.)

RULE 5.20 RECIPROCAL DISCIPLINE FOR MISCONDUCT

Upon the filing of an information directly in this Court by the chief disciplinary counsel that a lawyer admitted to practice in Missouri has been adjudged guilty of professional misconduct in another jurisdiction, this Court shall cause to be served on the lawyer an order to show cause why said adjudication should not

be conclusive of said misconduct for the purpose of discipline by this Court.

(Adopted June 20, 1995, effective Jan. 1, 1996.)

FEDERAL RULES OF CIVIL PROCEDURE, RULE 11

RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS

Text of Rule 11

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, imposed an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing

on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

As amended April 22, 1993, eff. December 1, 1993.

28 U.S.C. § 455

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances.

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or

material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purpose of this section the following words or phrases shall have the meaning indicated:

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(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for disqualification.

CONSTITUTION OF THE UNITED STATES

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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AMENDMENT [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any

State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any States shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

R.S. MO. §§ 484.240 AND 484.250

484.240. Removal or suspension without trial

If the charge allege a conviction for any criminal offense involving moral turpitude, the court shall, on production of the record of such conviction, remove the attorney so convicted or suspend such attorney from practice for a limited time, according to the nature of the offense, as the court may deem just, and without further trial. If the attorney be acquitted or discharge upon his trial, or if he be charged under subdivision (1), (2) or (3) of section 484.190, and appears at the time fixed by court and denies the charges preferred against him, or having been

notified as required by section 484.120 or 484.220, fails to appear, the court shall forthwith hear the evidence offered in support of said charge and the evidence offered by the accused, and shall determine the matter without delay. And if the court finds that the charge has been sustained, or if the accused shall admit that he is guilty, the court shall remove him from practice or shall suspend him for a limited period, according to the nature of the offense and as the court may deem just and proper.

(R.S.1939, § 13333.)

484.250. Trial by court or commissioner

All trials of charges preferred against attorneys shall be by the court, and in all cases of conviction the court shall pronounce judgment of removal or suspension according to the nature of the facts found; except that, if the charge be filed in the supreme court, or in one of the districts of the court of appeals, the court may appoint a special judge to hear the evidence and make report thereof to the court. In all cases the court may tax or abate the cost of the proceedings as it may deem just.

(R.S.1939, § 13334. Amended by L. 1973, S.B. No. 263, p. 93, § 1.)